Tim Foley Plumbing Service, Inc. *and* Indiana State Pipe Trades Association and U.A. Local 661, AFL–CIO. Cases 25–CA–25652, 25–CA–25730, 25–RC–9699.

May 31, 2002

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On March 26, 2001, Administrative Law Judge Arthur J. Amchan issued the attached supplemental decision, following the Board's remand. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief to the General Counsel's exceptions.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

These cases arise from unfair labor practice charges and from objections to a September 1997 representation election. On December 15, 2000, the Board issued a Decision and Order[2] setting aside the election and affirming the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider six job applicants for journeyman plumber positions and changing its hiring policies for the purpose of excluding union applicants. The Board also affirmed the judge's findings that the Respondent, through its agent, Kenneth (Richey) Harper, violated Section 8(a)(1) of the Act by threatening employees with a loss of wages and other benefits, interrogating employees about their union activities, and threatening employees with plant closure. The Board also found that the Respondent violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals because they wore union t-shirts. These findings and conclusions, having been resolved by the Board's Decision and Order, are res judicata for the purposes of this remanded proceeding.[3]

The Board remanded portions of this case to the judge to analyze the refusal-to-hire allegations under the framework set forth in *FES*, 331 NLRB 9 (2000). In doing so, the Board did not order a second election, but instead directed the judge to reconsider the propriety of a *Gissel*[4] bargaining order after the judge considered the Board's decision and the refusal-to-hire allegations.

On remand, the judge found, applying the *FES* framework, that the Respondent unlawfully refused to hire the six applicants because of their union affiliation. We agree.

To establish a discriminatory refusal-to-hire violation, the General Counsel must show: (1) that the respondent employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once the General Counsel has made this showing, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union activity or affiliation. *FES*, supra at 10.

Although the judge mischaracterized the practical differences between refusal-to-hire cases and refusal-to-consider cases,[5] he properly analyzed all of the elements of a discriminatory refusal-to-hire violation, as detailed below.

The Respondent was hiring. The judge found that within the 30-day shelf life of the applications of the six applicants, the Respondent hired four journeymen and at least three apprentices or helpers through temporary agencies. The Respondent excepts to the judge's finding and argues that it decided to use temporary agencies to hire 14 employees for legitimate business reasons. Respondent argues that when its manpower needs were greatly increased for short periods of time, it used temp o-

[1] We shall modify the judge's recommended Order and notice in accordance with our recent decisions in *Ferguson Electric Co., Inc.*, 335 NLRB 142 (2001); and *Ishikawa Gasket America*, 337 NLRB 175 (2001).

[2] 332 NLRB 1432.

[3] Chairman Hurtgen did not participate in the prior decision. He agrees with his colleagues that these findings and conclusions are res judicata. Member Bartlett also did not participate in the prior decision. He agrees with his colleagues that these findings and conclusions have been resolved by the Board's prior Decision and Order.

[4] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[5] As the Board held in *FES*, to establish a refusal-to-consider violation, the General Counsel must first show (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. The judge expressed doubt that the General Counsel could make such a showing "without first showing that the applicant had qualifications the employer was seeking." In fact, however, the General Counsel can satisfy his initial burden without addressing this point. See, e.g., *Norman King Electric*, 334 NLRB 154, 161 (2001); *3D Enterprises Contracting Corp.*, 334 NLRB 57 (2001). In a refusal-to-consider case, the General Counsel is *not* required to establish (as in a refusal-to-hire case) that the applicants had relevant experience or training. Accordingly, we disavow the judge's suggestion that the only practical difference between the test for a refusal-to-consider violation and the test for a refusal-to-hire violation is that the latter requires the General Counsel to show that there was a job opening for a particular applicant.

rary agencies to avoid laying off its permanent employees when the workload demands were not as great.

In his initial decision, the judge correctly described the Respondent's exclusive reliance on temporary labor agencies as both "sudden" and "temporary." The Respondent turned to the agencies promptly after receiving the discriminatees' applications in August 1997. (Prior to August 25, 1997, the Respondent used temporary labor services only once since 1995.) Direct hiring resumed, moreover, after November 24, 1997, when the discriminatees' applications were no longer active. Thus, as the judge concluded and the Board agreed in the original decision, this process was aimed at avoiding hiring union applicants.

The applicants had the requisite experience for the positions. The judge further found that the six union applicants had the experience and training required for the journeyman plumber positions with Respondent. We agree. In its exceptions, the Respondent argues that it refused to hire the six union applicants because their experience and training did not include residential and service work.[6] However, the judge found that all six applicants were licensed journeyman plumbers, and three had experience in residential or service work. The judge further found that the Respondent had approximately 12 commercial projects in progress during the relevant time period.

The Respondent also argues in its exceptions that it refused to hire the six union applicants because they did not have 6 or 8 years of experience as journeymen plumbers. However, the judge found that two of the applicants did possess 8 years of experience as journeymen plumbers. Furthermore, there is no evidence that the temporary employees utilized by the Respondent had such experience.

Antiunion animus contributed to the decision not to hire the applicants. Finally, in his initial decision, the judge found that antiunion animus contributed to the decision not to consider, interview, or hire any of the union applicants. The judge inferred animus and discriminatory motivation. It was undisputed that Tim Foley knew that the applicants were union members because they were wearing union t-shirts when they went to Respondent's human resources office and applied for the jobs. They wrote "voluntary union organizer" on the top of their applications. Admittedly, as a result of these applications, the Respondent posted a notice that it was no longer accepting employment applications at its office and that potential applicants were directed to the State employment office, where for 3 months no job orders were placed by Respondent. Then suddenly, the Respondent began to exclusively rely on temporary employment agencies for all of its manpower needs. Thus, the judge found, and we agree, that antiunion animus motivated the Respondent not to hire or consider the union applicants.

The Respondent failed to show that it would not have hired the alleged discriminatees even in the absence of their union affiliation. In its exceptions, the Respondent argues that it refused to hire or consider the union applicants because it was not hiring permanent employees. However, in his initial decision, the judge found that the Respondent offered no explanation as to why the advantages of using a temporary agency to hire temporary employees became so determinative for all of its hiring needs shortly after the six union applicants applied for positions. Therefore, the judge rejected this argument as pretextual. In its earlier decision, the Board agreed. Thus, the Board's remand precludes relitigating the validity of reasons that the judge determined were pretextual after the initial hearing.[7]

Accordingly, we affirm the judge's findings that the Respondent violated Section 8(a)(1) and (3) of the Act when it refused to hire six job applicants because of their union affiliation. We further agree with the judge that the General Counsel has not shown that a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is a necessary remedy in the particular circumstances of this case. However, unlike the judge, we do not rely on the fact that Supervisor Harper no longer works for the Respondent. Harper was a spokesman for Foley's views and the employees viewed Harper as an "extension" of owner Tim Foley. As Foley still remains the owner and highest management official of the Respondent, Harper's departure is of no consequence. Finally, we direct a second election.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Tim Foley Plumbing Service, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

[6] The judge incorrectly found that the Respondent, for the first time on remand, argued that the six union applicants lacked the necessary experience and training in residential and service work. In its exceptions, the Respondent points out that it argued that the applicants were not qualified in its posthearing brief to the judge. We agree with Respondent that it did raise this argument before. But in any event, the judge did consider the applicants' experience in his decision.

[7] Chairman Hurtgen agrees that this matter is res judicata. See fn. 3, supra.

Substitute the following for paragraph 2(c) of the judge's recommended order.

"(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel record and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to hire applicants on the basis of their union affiliation or based on our belief or suspicion that they may engage in organizing activity once they are hired.

WE WILL NOT refuse to distribute or accept employment applications at our Muncie, Indiana office.

WE WILL NOT threaten employees with the loss of wages or other benefits or other reprisals if they support the Union, including support by wearing a union T-shirt.

WE WILL NOT interrogate employees about the union membership, activities and sympathies of themselves or others.

WE WILL NOT promise employees benefits if they reject the Union.

WE WILL NOT inform employees that it would be futile for them to select the Union by indicating that we would never sign a contract with the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make William Fortwengler, Gregg Slentz, Daniel S. "Steve" Small, Denny R. Smith, Stacy L. Stockton, and James M. Salmon whole, with interest, for any economic loss suffered as a result of our failure and refusal to hire them.

WE WILL offer William Fortwengler, Gregg Slentz, Daniel S. "Steve" Small, Denny R. Smith, Stacy L. Stockton, and James M. Salmon employment in positions for which they applied. If those positions no longer exist, we will offer them employment in substantially equivalent positions, without prejudice to seniority or any other rights or privileges to which they would have been entitled if we had not discriminated against them.

TIM FOLEY PLUMBING SERVICE, INC.

Joanne C. Mages, Esq., for the General Counsel.
Ray Blankenship, John D. Meyer (R. T. Blankenship & Associates), of Greenwood, Indiana, for the Respondent.
William R. Groth, Esq. (Fillenwarth, Dennerline, Groth, & Towne), of Indianapolis, Indiana, for the Charging Party.

SUPPLEMENTAL DECISION

ARTHUR J. AMCHAN, Administrative Law Judge. On December 15, 2000, the Board issued a decision in this case affirming in part the rulings, findings, and conclusions I reached in my August 3, 1998 decision in this case. Among those portions of the decision affirmed by the Board was my finding that Respondent violated Section 8(a)(3) and (1) of the Act in refusing to consider six job applicants based on their union affiliation. However, the Board remanded to me the issue of whether Respondent also violated the Act in refusing to hire these applicants pursuant to the analysis set forth in *FES*, 331 NLRB 9 (2000).

The Board also held, contrary to my initial decision, that Respondent, by Jeffrey Payne, violated Section 8(a)(1) of the Act. Payne, an electrical contractor and friend of Respondent's president Tim Foley, was invited by Foley to speak to Respondent's employees at a captive audience meeting during the Union's organizing campaign. During this meeting, Payne pointed to two employees, who he recalled wore union T-shirts to an earlier representation hearing and said they were silly for letting the Union dress them up and that they looked like targets. Finally, the Board, while agreeing that Respondent's violations warranted setting aside the election of September 18, 1997, directed me to reconsider the propriety of a *Gissel* bargaining order in light of its decision and my findings on remand.

Review of the facts[1]

Prelude to the filing of a representation petition

The Union, Local 661 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, commenced a campaign to organize Respondent's plumbing employees in January 1997. Over the next several months it obtained authorization cards from a number of Respondent's

[1] My initial findings of fact are reiterated and incorporated. However, I am repeating these findings so that the reader need not refer to another document in order to determine the basis for my conclusions of law.

plumbers.[2] In June, Ken Lewis, the business manager of Local 661, met with Respondent's owner, Tim Foley, on two occasions to encourage Foley to enter into a collective-bargaining relationship with the Union. Foley declined the offers. By early August, Foley was aware of the Union's organizing campaign. On August 12, the Union filed a petition with the NLRB, which it also presented to the Respondent, asking for recognition as the exclusive bargaining agent of Foley's plumbing employees.

The salting attempt by the Union

On August 22, six Local 661 members, each of whom was a licensed journeyman plumber (as well as pipefitter), accompanied Business Agent Jack Neal Jr., and organizer Tony Bane to Respondent's offices about mid-day. Neal and the six plumbers, all wearing union T-shirts and some wearing union hats entered the office, which became crowded with them inside. They asked Respondent's receptionist, Samantha Stauffer, for employment applications. Stauffer, who was very new on her job, couldn't find them. She went upstairs to consult with Michelle Miller, Respondent's office manager. Miller came downstairs and passed out applications to all the union members except Neal. Neal did not request an application.

Some the applicants did not have a pen or pencil. Stauffer and/or Miller loaned one or more applicants a writing utensil. Other applicants went to their trucks to obtain one. Neal and /or one or more of the applicants asked questions of Miller and Stauffer, including what parts of the applications had to be completed, how long the applications were good for, who reviewed them, when they would be notified if they were going to be offered jobs, the amount of business Respondent had ongoing and where the company's licenses were displayed. As advised by either Neal or Bane, each of the six plumbers wrote "voluntary union organizer" on the top of their employment application. Each asked for and received a copy of their application, also in accordance with directions given by Neal or Bane. After about 15 minutes at Respondent's office, the applicants and Neal left.

Four of the union applicants were unemployed on August 22; the two others, Gregg Slentz and Daniel "Steve" Small, were employed and filed applications during their lunchbreak. Both of these employees testified that they would have left the jobs they held and would have taken a job with Foley in order to organize the company. There is no way of knowing whether they would have done so, although in other cases construction unions have subsidized their members' salaries while working for employers the Union wished to organize. Slentz left his application blank where it asked for position and salary desired. Small wrote in "plumber" and "any" in the appropriate boxes. Slentz and Small appear to have experience exclusively in the commercial and industrial phase of their trade—which would have qualified them to work at the many hotel and assisted living projects Foley had in the summer and fall of 1997.

Stacy Stockton, who received his Indiana journeyman plumber's license in April 1997, had applied for employment at Respondent's office in May 1997, apparently without any encouragement to do so from the Union. He had been off from work for about 6 months in August. During this time period he had applied for employment, on his own, with two other nonunion plumbing contractors as well as with several nonplumbing employers. Stockton applied for the position of "plumber or pipefitter" and wrote "open" in the space for salary desired. Stockton had no experience in service or residential plumbing. Like Slentz and Small, his experience was in commercial and industrial plumbing.

Denny Smith, a journeyman plumber and pipefitter, had also been unemployed for a while when he went to Respondent's office on August 22. Since joining the Union, Smith has worked for one nonunion contractor for a period of about 2 months. He did so with the Union's permission. Within the year of his application to Foley, Smith also applied for a nonunion pipefitter's job at Delco Corporation. Smith applied for the position of "journeyman plumber" at Foley, but said he would accept any salary. In addition to commercial construction experience, Smith had 3 years of experience performing residential plumbing.

James Salmon had been laid off by a union contractor sometime before August 22. While on layoff he applied for work with a number of employers other than Respondent. At the time of the hearing in this matter, Salmon was employed in a nonunion plumbing job at Ball State University, earning $17 per hour, below union scale. Salmon applied for the position of "plumber" and left the blank for "salary desired" open. In addition to performing commercial and industrial plumbing, Salmon had experience in residential and service work.

William Fortwengler had been unemployed since July. During a period of layoff between July and October, Fortwengler applied for work with several employers. On his application for Foley, Fortwengler applied for "journeyman plumber" and wrote "open" for salary desired. He also had residential plumbing experience in addition to experience in commercial and industrial plumbing.

During the time the union applicants were at Foley's office, Miller and Stauffer were the only company employees present. The rest of Respondent's office staff were at lunch. Respondent's telephone rang during this period with calls from customers and employees. These calls were answered primarily by Stauffer, while Miller took care of the applicants. Respondent contends that the applicants were rude and disruptive. I conclude that this has not been established. The primary motive of Bane and Neal, and probably some of the applicants, was to organize Respondent. This was made patently clear to Miller and Stauffer by the wearing of union paraphernalia and writing "voluntary union organizer" at the top of each application. Bane was also concerned that Tim Foley would hire antiunion employees, who might tip the balance against the Union in the upcoming representation election.

Miller was aware that a representation petition was filed and that her employer had retained R. T. Blankenship & Associates, labor consultants, to advise and assist him in his campaign against the Union. She was preconditioned to perceive the union applicants as rude and disruptive. Indeed, she concluded that they had "an ulterior motive" from the fact that the appli-

[2] Foley also employs carpenters, warehouse employees, and office clericals.

cants showed up at the same time wearing union T-shirts. Stauffer was apparently nervous during this period because she couldn't find the employment applications and because "big burley guys always seem to intimidate me."

When Tim Foley returned from lunch, Miller gave him the six union applications. He told her to contact Stephen LePage, an employee of Blankenship. After consultation with LePage, Respondent, on August 23, posted a notice on its door stating that it would no longer accept employment applications at its office. Applicants were directed to apply through the Muncie office of Indiana Workforce Development, a State agency which administers Indiana's unemployment insurance system and provides a labor exchange for employers and prospective employees. Respondent concedes that the notice was posted in reaction to the visit by the union applicants and was put up to prevent a recurrence of such a visit.

Job applicants may apply to a prospective employer through Indiana Workforce Development only if the employer places a job order with the agency. Respondent did not place such a job order in August. It did not do so until November 17.[3] Until that time there was no way a job applicant could apply for a job with Tim Foley Plumbing through Indiana Workforce Development.

Respondent never contacted any of the union applicants. Tim Foley received the applications and gave no consideration to any of them. During the late summer and early fall of 1997 Respondent was unusually busy. It had 10–12 new projects in progress at the same time. These included installation of the plumbing at several motels, several assisted living projects and apartment complexes, which were under construction. On August 11, Foley hired Larry Swallow, a tenant and handyman at a property owned by him. On August 14, Foley hired John Hobson. Both new employees were hired to do plumbing work and are members of the bargaining unit.

After hiring Hobson, Respondent did not directly hire any plumbing employees again until November 24. Instead, Foley fulfilled his labor needs entirely through temporary labor agencies and the use of subcontractors. Tim Foley considers employment applications to be active for a period of 30 days. In the 30 days following receipt of the union applications Respondent utilized the services of the following journeymen plumbers through Tradesman, a temporary labor agency:

> Lee Hiles, from August 25 to February 12, 1998;
> Bill Conn, from August 29 to September 18, 1997;
> Richard Hilligoss, from September 10 to March 20, 1998.

Foley paid Tradesman between $20.52 and $27.33 per hour for these plumbers. Respondent also employed Robert Richards from National On-Site Personnel on September 11 for $22.87 per hour.

In addition, Respondent used the services of a number of apprentices and helpers during this period through the Labor Ready employment agency. Foley paid Labor Ready $13.65 per hour for the services of these employees. Respondent had used temporary labor services previously. However, prior to the August 25, 1997, it had not done so since 1995, with one exception.[4] Moreover, Respondent's use of temporary employees in the fall of 1997 appears to be unprecedented, even in comparison with 1994 and 1995.

Among those apprentices and helpers employed through Labor Ready within 30 days of the salt's applications were:

> Thomas Gates, who worked from August 25 to December 12, 1997;
> Gary Smith, who worked from September 3, 1997 to November 22, 1997;
> Richard Stahl, who worked as a temporary employee from August 25, 1997 to January 23 1998, and then was hired as a full-time employee.

After November 24, Foley resumed its direct hiring of plumbers, including five journeymen in late 1997 and early 1998.[5] The three journeymen hired in 1998 were employed through Workforce Development.

The election Campaign

On August 28, Respondent and representatives of the Union met at the NLRB offices in Indianapolis to participate in a representation hearing. Two bargaining unit members who attended, Bob Baker and Richard Howard, wore union T-shirts. On August 29, the parties entered into a stipulated election agreement. Among the stipulations were that the election would be held on September 18, and that employees on the payroll as of Sunday, August 24, would be eligible to vote. The appropriate collective-bargaining unit was described as:

> All plumbers, apprentice plumbers, and plumber helpers, BUT EXCLUDING all carpenters, carpenter helpers, office clerical employees, and all guards and supervisors as defined in the Act.

Unfair Labor Practice by Tim Foley

On or about the week of September 15, just before the election, Respondent's president Tim Foley confronted Richard Howard with his timecard. Foley and Howard argued as to whether Howard could be paid for the time spent driving a company vehicle to a project in Frankfort, Indiana. Foley told Howard that in a "union setting," employees would drive their own vehicles to work and the issue of being paid for travel time

[3] I credit the testimony of Indiana Workforce Development Supervisor Randall Ziegler over that of Respondent's Office Manager Michelle Miller.

[4] Foley was in contact with at least two of these agencies on August 21, and early on August 22, prior to the arrival of the "salts" at his offices.

[5] Four of Respondent's employees, who were union supporters, went on strike on October 3. Richey Harper resigned his employment in October. However, Respondent does not claim that its direct hiring after November 24, was undertaken to replace the strikers, or Harper. Indeed, Foley did not seek plumbers through Workforce Development until November 17, at least 6 weeks after the strike began. The hiring of at least of some of the employees after November 24, appears to correlate to the end of the tenure of one of Foley's temporary employees. For example, Roger Jarvis was hired on November 24, 2 days after Gary Smith stopped working for Foley. Several employees appear to have been hired right after Lee Hiles stopped working for Respondent as well.

would not arise.[6] I have previously concluded that Foley's remarks violated Section 8(a)(1).

Unfair practices in the period between the filing of the petition and the election by Richey Harper

During the first few weeks following the filing of the Union's petition, Richey Harper, who was in charge of several of Respondent's jobsites, discussed the Union with apprentices Chris Brown, Scott Mitchell, and journeyman Richard Howard. Harper told Brown and Mitchell that if Respondent was unionized, apprentices would be paid about $7.50 per hour. At the time Brown was making $12.50 per hour and Mitchell $9. Harper also inquired how they would vote and tried to elicit information from Brown and Mitchell as to how others would vote. Harper told all three employees that Tim Foley would never sign a collective-bargaining agreement with the Union. He also told them that Foley might sell the company's tools and trucks, or shut down completely in order to avoid unionization. Howard and Mitchell discussed their conversations with Harper with other bargaining unit employees.

Harper also told Mitchell that Tim Foley would "be looking out for" those employees who voted against the Union. Harper also visited Chris Brown at his home just prior to the election. He again asked Brown how he would vote and sought information as to how other employees would vote.

Additionally, Harper told employees on August 18, that they would have to supply their own tools and drive to work in their own trucks if the Union won the election, and told an employee that he would only work 6 months out of the year if the Union won—despite Respondent's practice to keep employees year-round. The Board has found that all these statements constitute 8(a)(1) violations that Harper was an agent of Respondent and therefore his actions and statements are imputed to Tim Foley Plumbing.

Company campaign meetings

Respondent held three meetings for employees just prior to the election in an effort to convince them to vote against the Union. Stephen LePage, an employee of R. T. Blankenship & Associates, conducted the first two meetings. The Board has affirmed my dismissal of allegations that Respondent, by Le Page, committed unfair labor practices.

At the last of the company campaign meetings, Tim Foley invited Jeffrey Payne, a friend and electrical contractor, to talk to Respondent's employees. Payne, who also accompanied Foley to the representation hearing in August, discussed his experiences many years ago in trying to organize his employer and recent efforts by the IBEW to organize his company, Electrical Specialties, Inc. (ESI). During his talk, Payne recalled seeing two Foley employees wearing union T-shirts at the NLRB representation hearing. Payne said they were silly for letting the Union dress them up and that they looked like targets.

[6] Howard discussed this conversation with employees Baker, Brown, and Mitchell, all of whom were union supporters.

The Election

The representation election was conducted at Respondent's warehouse on September 18. Prior to that date the Union had obtained authorization cards from 12 of the 19 employees that both parties agree were in the bargaining unit. The last of the cards was signed on September 2. They read, in pertinent part, as follows:

> The signing of the attached card will permit the United Association or one of its locals to seek to bring you the benefits of our union in a collective bargaining agreement.
>
> Authorization for Representation Under the National Labor Relations Act
>
> I, the undersigned employee of the (company name) employed as (occupation or job description) at (city, State, location or project), hereby authorize Local Union No. __ of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, affiliated with the AFL–CIO, or its agent, or representatives, to represent me in collective bargaining negotiations on all matters pertaining to rate of pay, hours or any other condition of employment.

There is no credible evidence that anything was said to any of the card signers which was calculated to direct the signer to disregard and forget the language above his signature.[7] Ten employees voted against the Union and nine voted for it. The Union challenged the ballots of John Adams and Richey Harper on the grounds that they were supervisors. [8]

Supplemental Conclusions of Law

Respondent violated Section 8(a)(1) and (3) in refusing to hire six union members who filed employment applications with it on August 22, 1997.

In *FES*, the Board set forth the analytical framework for refusal-to-hire violations. The General Counsel must show that:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

[7] Two card signers, Mike Licht and Scott Chambers, who still work at Tim Foley Plumbing, testified for Respondent. Even if I found their testimony regarding the circumstances under which they signed their cards completely credible, I would find that the union representatives did not mislead them as to the purposes of the card. Moreover, I find that their recollection of the card signing was selective in a manner calculated to mollify Tim Foley.

[8] The Board in footnote 6 of its decision states that it is unnecessary to determine whether John Adams was a supervisor because no allegations of unfair labor practices pertain to Adams and because the parties have agreed not to open or count his or Richey Harper's challenged ballots.

In contrast, to establish a discriminatory refusal-to-consider, the General Counsel must show that: (1) the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment.

Once this is established, the burden shifts to the employer to show that it would not have considered the applicants even in the absence of their union activity or affiliation. Similarly, once the elements of a refusal-to-hire violation are established, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

The Board stated further in *FES* that, in a discriminatory hiring case, whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits. The General Counsel must show that there was at least one available opening for the applicants. He must show at the hearing on the merits the number of openings that were available. However, where the number of applicants exceeds the number of available jobs, the compliance proceeding may be used to determine which of the applicants would have been hired for the openings.

In comparing the elements of refusal-to-consider versus a refusal-to-hire violation, the practical difference in most cases will be only the issues of whether there were job openings for the applicants and whether there was an opening for each one. It is difficult to conceive how the General Counsel would establish that an applicant was excluded from the hiring process for discriminatory reasons without first showing that the applicant had qualifications the employer was seeking.

The instant case provides a good example. The Board has affirmed my finding that Respondent violated the Act in refusing to consider the six union applicants for employment. If the record did not show that the six applicants were qualified in terms of experience and training to perform the work of Respondent, it would be virtually impossible to conclude that antiunion animus contributed to their exclusion from the hiring process.

Each of the six applicants had extensive experience and training in the plumbing trade. Thus, each applicant "had experience or training relevant to the announced or generally known requirements of the positions for hire." The only real issue on remand is whether there were jobs available for them at Foley and/or how many jobs. For this reason, in my Notice and Invitation to File briefs, I stated that "[g]iven the fact that the Board has affirmed my conclusion that Respondent refused to consider the six discriminatees for employment for unlawful reasons, Respondent is precluded from arguing anew that it would have declined to hire any of these job applicants for lawful reasons." The Board's remand precluded relitigating the reasons that I determined were pretextual after the initial hearing. Moreover, this case provides an excellent example of why it is inappropriate to consider on remand, a rationale for an employer's actions which has never before been advanced.

Respondent, on remand, argues for the first time that it didn't hire the six union applicants because their experience and training did not include residential and service work. At the initial hearing, the only reason Respondent gave for not considering these applicants was that it was not hiring full-time employees.

The Board has long expressed the view that when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted, *Black Entertainment Television,* 324 NLRB 1161 (1997). Such an inference is much stronger when an employer first offers its alternative rationale on remand, almost 3 years after the initial hearing and after its initial defense has been rejected.

Moreover, even a cursory examination of the record shows this new rationale to be false. At the time the six union plumbers submitted their applications to Foley, Respondent had 10–12 commercial projects in progress, including the plumbing work for a number of motels and assisted living facilities. There is no evidence that any of the temporary laborers it utilized after the discriminatees applied were assigned to residential and/or service work. Indeed, Richey Harper's material and labor records (GC Exh. 19) show that much, if not all, of this labor was used on Respondent's commercial projects.[9] Moreover, at least three of the applicants, Denny Smith, James Salmon, and William Fortwengler had residential and/or service experience. I therefore find that the General Counsel has established all the elements of a refusal-to-hire violation and that Respondent has not established a credible affirmative defense.[10]

Further, I find that there was a position available for all six of the applicants. On September 11, 1997, within the 30-day shelf live of their applications, Respondent had four journeymen working for it through temporary agencies, who had started after August 22, 1997. There were also at least three apprentices or helpers working for Foley on that date, through temporary agencies, who had been hired after August 22. Although the six applicants were journeymen, only two indicated that they would only accept positions as journeymen. None of them made any specific salary demands and four indicated they would accept any salary. Given the fact that four were unemployed and all six were motivated in part by a desire to organize Respondent, I conclude that there was a position available

[9] Harper's records also show that Respondent was actively seeking labor and was having some trouble finding it after the salts applied for work.

[10] Respondent also argues at p. 7 of its supplemental brief that five of the applicants did not possess the requisite training and experience because they did not have 8 years experience as a journeyman plumber. In making this argument, Respondent relies on a job order placed with the Indiana Workforce Development office 3 months after the discriminatees applied for work. This does not establish the experience and training relevant to the requirements for positions filled by Respondent prior to November 17. Indeed, Tim Foley never claimed that he ignored or rejected the six union applicants on this basis. Moreover, there is no evidence that the employees hired through employment agencies in August and September 1997, had such experience. Finally, the record clearly shows that applicants Salmon and Small had more than 8 years as a journeyman. Additionally, it's not clear that the 96 months on the job order refers to experience as a plumber or experience as a journeyman. Smith and Fortwengler had more than 8 years of experience as plumbers. Fortwengler had been a journeyman for 6 years and Smith for 4 years.

for each of them if Respondent had considered their applications and made its hiring decisions on a non-discriminatory basis.

An order requiring Respondent to bargain with the Union is not warranted.

The General Counsel seeks a bargaining order to remedy Respondent's statutory violations during the period between the filing of the representation petition and the election. The Board has directed me to reconsider my initial ruling in light of its decision and my finding of six refusal-to-hire violations. Pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), there are two categories of cases in which the Board may issue such an order. "Category I" cases are those marked by outrageous and pervasive unfair labor practices. "Category II" cases are less extraordinary cases marked by less pervasive practices which still have the tendency to undermine majority strength and impede the election process.

I conclude that the instant case satisfies neither the "Category I" or "Category I" criteria.

To warrant the issuance of a bargaining order in "Category II" cases, (1) the union must have had majority support within the bargaining unit at some time; (2) the employer's unfair labor practices must have had the tendency to undermine majority strength and impede the election process; and (3) the possibility of erasing the effects of past unfair labor practices and ensuring a fair rerun election by use of traditional remedies is slight, and the once-expressed sentiment in favor of the union would be better protected by a bargaining order, *CWI of Maryland, Inc.*, 321 NLRB 698, 709–710 (1996), enfd. 127 F.3d 319, 333–334 (4th Cir. 1997).

The Union had the support of a majority of employees in the bargaining unit as of August 18.

By August 18, when Scott Chambers signed an authorization card, the Union had the support of 10 of the 19 members of the bargaining unit. By September 2, it obtained authorization from two more employees to represent them.

Respondent's unfair labor practices had the tendency to undermine the Union's majority strength and impede the election process.

Respondent's unfair labor practices, particularly the remarks made to employees by Richey Harper, had the tendency to intimidate employees, particularly the apprentice plumbers to whom they were directed. Moreover, they were disseminated to an extent throughout the small bargaining unit. These remarks thus had a tendency to undermine the Union's support.

It has not been established that the possibility of erasing the effects of past unfair labor practices and ensuring a fair rerun election by use of traditional remedies is slight.

In determining the propriety of a bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of dissemination among employees, and the identity and position of the individuals committing the unfair labor practices, *Holly Farms Corp.*, 311 NLRB 273 (1993).

Owner Tim Foley committed unfair labor practices by refusing to hire the six union "salts", by changing his employment application policy and threatening Richard Howard with loss of the use of company vehicles. Foley's friend, Jeffrey Payne, who Foley invited to address his employees, also violated the Act by impliedly threatening employees because they wore union T-shirts. Richey Harper, who committed many of the other violations by threatening and interrogating employees, no longer works for Respondent. I conclude that the violations were not so serious or pervasive that they cannot be cured by remedies such as backpay, offering employment to the six "salts," a return to the status quo ante with regard to employment applications and the posting of a notice.

The General Counsel is correct that, "there is no prerequisite that an employer discharge an employee in order for the Board to issue a bargaining order." However, the cases counsel cites are easily distinguishable from the instant case in the severity of the violations. In *Skyline Distributors*, 319 NLRB 270 (1995), a bargaining order was issued in large part due to the employer's illegal wage increases during the organizing campaign. The Board noted that such violations have an enduring impact because of their value to employees and because the Board does not compel a respondent to withdraw such benefits.

The violations committed by Tim Foley personally; refusals-to-hire, limited threats and a change in hiring procedures, were neither sufficiently serious nor pervasive to warrant the issuance of a bargaining order. Additionally, Richey Harper threatened a number of employees with a loss of benefits if the Union won the election, indicated that choosing the Union would be an exercise in futility and raised the specter that Tim Foley would go out of business to avoid unionization. However, the fact that Harper no longer works for Respondent weighs heavily in my conclusion that a bargaining order is not warranted. In *Tufo Wholesale Dairy*, 320 NLRB 896 (1996), for example, the Board placed great weight on the fact that two individuals who committed serious and widespread unfair labor practices, including discouraging employees to comply with Board subpoenas to attend a hearing, remained the employer's owners. This convinced the Board of the likelihood of recidivist behavior. In the instant case, the fact that Harper no longer works for Tim Foley Plumbing makes it less likely that recidivist behavior will occur.[11]

CONCLUSIONS OF LAW

1. By threatening employees with the loss of wages and other benefits, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

[11] *Garvey Marine, Inc.*, 328 NLRB 991 (1999), cited by the General Counsel and Charging Party does not support a different conclusion. In that case the Board found that the departure of a supervisor who committed repeated and serious violations of Sec. 8(a)(1) did not diminish the necessity of a bargaining order. However, the Board relied on the fact that many other officials at various levels of management hierarchy participated in Sec. 8(a)(1) and (3) violations during and immediately after the election campaign. In *Garvey*, a company vice-president still employed by the respondent was responsible for the unlawful discharges of the two principal union supporters.

2. By coercively interrogating employees about the union membership, activities, and sympathies of themselves and others Respondent violated Section 8(a)(1).

3. By threatening employees with closing the business if they selected the Union as their collective-bargaining representative, Respondent violated Section 8 (a)(1).

4. By threatening employees with unspecified reprisals because they wore union T-shirts, Respondent violated Section 8(a)(1).

5. By indicating that employees who opposed the Union would be "looked out for", Respondent violated Section 8(a)(1).

6. By indicating that it would never sign a collective-bargaining agreement with the Union, Respondent violated section 8(a)(1).

7. By refusing to hire applicants William Fortwengler, Gregg Slentz, Daniel S. "Steve" Small, Denny R. Smith, Stacy L. Stockton, and James M. Salmon, since August 22, Respondent violated Section 8(a)(1) and (3).

8. By changing its hiring policies on August 22, by requiring employees to apply through Indiana Workforce Development, Inc., rather than at its offices, Respondent violated Section 8(a)(1).

9. Richey Harper, Jr. and John Adams were, at all material times, supervisors within the meaning of Section 2(11) of the Act, as well as agents of Respondent.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having refused to hire William Fortwengler, Gregg Slentz, Daniel S. "Steve" Small, Denny R. Smith, Stacy L. Stockton, and James M. Salmon, it must offer them instatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from they date they would have been hired less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I further recommend that the election held September 18, 1997 be set aside and that Case 25–RC–9699 be remanded to the Regional Director for Region 25 for purposes of conducting a new election at such time as he deems that circumstances permit a free choice of bargaining representatives.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Tim Foley Plumbing, Inc., Muncie, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire applicants on the basis of their union affiliation or based on Respondent's belief or suspicion that they may engage in organizing activity once they are hired.

(b) Refusing to accept employment applications at its Muncie, Indiana office.

(c) Threatening employees with the loss of wages and other benefits if they select the Union as their collective-bargaining representative.

(d) Interrogating employees about their union membership, activities, and sympathies of themselves and others.

(e) Promising employees unspecified benefits if they did not support the Union.

(f) Threatening employees with the closing of the business or other reprisals if they select the Union as their collective-bargaining representative.

(g) Informing employees that it would be futile to select the Union as their collective-bargaining representative because Respondent would never sign a contract with the Union.

(h) Threatening employees with unspecified reprisals because they wore union T-shirts.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Fortwengler, Gregg Slentz, Daniel S. "Steve" Small, Denny R. Smith, Stacy L. Stockton, and James M. Salmon instatement to a job for which they applied or a substantially equivalent position, without prejudice to their seniority or any other rights or privileges.

(b) Make William Fortwengler, Gregg Slentz, Daniel S. "Steve" Small, Denny R. Smith, Stacy L. Stockton, and James M. Salmon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Muncie, Indiana facility, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "posted by order of the national labor relations board" shall read "posted pursuant to a judgment of the united states court of appeals enforcing an order of the national labor relations board."

not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 18, 1997.[14]

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(f) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[14] The first unfair labor practices committed by Ritchey Harper occurred about August 18.